No. 73.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

UNITED STATES OF AMERICA,
*Appellant*,

vs.

THE STATE OF MISSISSIPPI et al.,
*Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

## BRIEF FOR THE MEMBERS OF THE STATE BOARD OF ELECTION COMMISSIONERS OF THE STATE OF MISSISSIPPI

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### PRELIMINARY STATEMENT

This separate brief presents the clearly separable and distinct position of the members of the State Board of Election Commissioners. These appellees adopt the brief of the six appellees who were sued as registrars of voters as to the remaining points of argument raised on this appeal.

## SUMMARY OF THE ARGUMENT

The members of the Mississippi Board of Election Commissioners were improperly joined as defendants in this action. The complaint makes no allegation that these officers took any *action* of any kind; obviously therefore no wrongdoing by them is alleged which would justify any part of the relief ostensibly sought against them. They cannot be enjoined to "register" anyone. The statutes of the State do not now give and have never given them such power. A fortiori, they have not failed or refused to register any person because of race or color or on any other basis.

A comparison between the statute which sets out the explicit requirements for constituting the sworn written application form for registration and the form itself, discloses the completely ministerial and perfunctory nature of the acts which these defendants perform.

We submit that these board members must have been made defendants in an attempt to use them as a *joinder device* to circumvent the spirit and letter of the authority given to the Attorney General in § 1971 to bring separate actions in separate governmental subdivisions.

A principal basis of the government's argument that these members were proper defendants is in error. *This Board does not have the power to remove a registrar.* It is not even free to appoint who it may choose.

The Board members had no interest which would have been affected by any decree that could have been made. Complete relief did not demand their presence. This action was framed as one against officials who served as registrars and not against this Board.

## ARGUMENT

### The Lower Court Was Correct in Dismissing This Action As to the Members of the Mississippi Board of Election Commissioners

Every allegation of the complaint which related to these officials is set out in the margin.[1]

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1. Ross R. Barnett, Joe T. Patterson and Heber A. Ladner are members of the Mississippi State Board of Election Commissioners by virtue of their official positions as Governor, Attorney General and Secretary of State, respectively. The State Board of Election Commissioners is an agency of the defendant State of Mississippi. The offices of said defendants are in the state capitol, Jackson, Mississippi. (R. 1) Registrars of voters in Mississippi, including the defendant registrars are agents of the Mississippi State Board of Election Commissioners (R. 2). [Note: This conclusion of law is clearly negated by the statutes of the State which define the connection between these separate officials. See Mississippi Code of 1942, §§ 3204 and 3206 in the Appendix to this Brief.] . . . the State Board of Election Commissioners was directed to prepare a sworn written application form (which included the interpretation test and the duties and obligations test) (R. 6) . . . the Mississippi Legislature amended Section 3209.6 of the Mississippi Code to require that the defendant State Board of Election Commissioners in preparing the application forms to be used by the county registrars should include therein spaces for information showing the good moral character of the applicant in order that the applicant may demonstrate to the county registrar that he is a person of good moral character. (R. 11) . . . In 1955, the Mississippi Legislature passed a statute requiring the defendant State Board of Election Commissioners to prepare a series of registration application forms suitable for obtaining pertinent information with respect to the applicant's qualifications, including spaces to test the applicant's ability to read and write any section of the Constitution of the State of Mississippi and give a reasonable interpretation thereof, and a space for the applicant to demonstrate to the county registrar a reasonable understanding of the duties and obligations

It can readily be seen from these allegations that these Board members were not alleged to have engaged in any *action* at all, let alone action which would have justified the granting of any relief against them. The complaint did not even allege that they performed the duty imposed on them by the statute, much less that they performed this duty improperly or wrongfully. The complaint was utterly devoid of any pretense of a claim that the State Board of Election Commissioners combined or conspired with any other defendant in the action to register or refuse registration to any applicant.

An examination of the complaint with a view to the relief sought reinforces the validity of the Court's dismissal of these parties. They were not proper or necessary parties to a suit seeking a declaration of unconstitutionality: (a) As to §§ 244 and 241-A of the Constitution of Mississippi and all statutes implementing these sections[2]—because they did not enforce a single one of such sections or statutes and because whatever duties they impliedly had, have obviously been long ago performed; (b) As to the four House bills 822, 900, 903, and 904 enacted at the 1962 session of the legislature[3]—because not one of these bills relates to the members of this Board; (c) As to the provisions of § 3209.6 of the Mississippi Code providing for destruction of application forms[4]—because no member of this Board is or ever has been the custodian of any such

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of citizenship under a constitutional form of government. (Sec. 3209.6, Miss. Code.) (R. 13). . . . This statute (House Bill 905) amended Section 3209.6 to require the defendant State Board of Election Commissioners to make provision on the application form for the applicant to demonstrate good moral character . . . (R. 17).

2. Prayer, Paragraphs 1 and 2 (R. 22).

3. Prayer, Paragraph 3 (R. 22).

4. Prayer, Paragraph 4 (R. 22)

records, nor were such members charged with having caused, or threatened to cause, the destruction of such records.[5]

They were not proper or necessary parties to a suit seeking a finding of a pattern and practice by the defendant County registrars of racial discrimination in registering electors[6] or to a suit seeking the issuance of a preliminary injunction prohibiting five classes of action concerned with the registration of electors[7] because they don't function as registrars. They were not proper or necessary parties to a suit for an injunction to require defendants to register Negro applicants possessing designated qualifications,[8] because no relief could have been granted as against these board members or any officer who was not even vested with authority to register or deny registration to anyone.

Since these defendants at all times have lacked the authority to register any applicants, it is all the more obvious that they never could have been guilty of failing or refusing to register any otherwise qualified person on the basis of race, color or any other criteria.

Despite the absence of any alleged wrongdoing on the part of these defendants in the Complaint, the *brief* for the United States suggests that a future wrong might arise in connection with the preparation of application forms to be used by County Registrars. Even the most cursory comparison between the pertinent statute[9] and the appli-

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5. The allegations of the Complaint bear this out. Cf. Paragraph 59 of the Complaint (R. 14).

6. Prayer, Paragraph 5 (R. 22).

7. Prayer, Paragraph 6 (R. 22, 23).

8. Prayer, Paragraph 7 (R. 23).

9. § 3209.6

cation form[10] discloses that the form prepared was simply a recast of the statute, no more—no less. Such a comparison makes it transparent that these officials are, precisely as the majority opinion below described them, mere conduits through which a completely ministerial and perfunctory function of the State's registration process flows to the registration officials.[11]

These Board members are not charged with any wrongful act or omission. Every valid presumption is that they have done and will do their duty as required by statute.[12]

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10. See Appendix B to the Brief for the United States, pp. 116-120.

11. Compare the position of these Board members with the pipe line companies in the case of *Commonwealth of Pennsylvania* v. *West Virginia (Ohio* v. *Same)*, 262 U.S. 553, rehearing granted 263 U.S. 671, affirmed on rehearing without modification 263 U.S. 350. There, in a suit contesting the enforcement of a West Virginia statute regulating the amount of gas which could be transported out of the state by private pipe line corporations, the Court held the pipe line companies were not requisite parties, even though they owned and operated the pipe lines which transported the gas which was the subject of the controversy. Obviously this holding was predicated upon a presumption of continued correct and lawful conduct on the part of these private concerns, as well as upon the basis that the real controversy was with others. The precise holding was in this language:

> "The third question is whether the requisite parties have been brought into the suits. It is objected that the pipe line companies have not been brought in. But there is nothing which makes their presence essential. The complainant states make no complaint and seek no relief against them. They are supplying gas in those states, and evidently will continue to do so, if not restrained or prevented by the defendant state. It is only with her that the complainant states are in controversy."

12. In *Watson et al.* v. *Buck et al.*, 313 U.S. 387, 400, the Court held that even a statement by the Attorney General of a state whose laws were attacked as unconstitutional that he stood ready to do his duty to enforce the law would not overcome the presumption of even, fair and lawful conduct on the part of such officer so as to warrant an injunction against him. The Court said:

In trying to reason why these Board members were ever named as defendants, without any proof of wrong or any right to relief alleged, or known to exist, one is only left with the conclusion that these Board members were made defendants in the hope that they might serve as a *joinder device* to enable the Department of Justice to bring together, in one action, all of the various County Registrars they wished to join originally or later without venue or jurisdictional deficits. Now, by the government's brief, the parties are advised that the Attorney General desired to remake the dismissed proceeding into one seeking a combined pattern and practice finding extending throughout eighty-two voting subdivisions or areas of the state.[13]

42 USC, § 1971 is the only source of authority which the Department of Justice might have had for an even colorable claim to bring this action. Its plain words show it was enacted to permit suits against offending registration officials. It could not support the six-faceted action filed. It certainly could not be stretched to any such lengths as now envisioned. The legislative history of § 1971 reinforces this obvious facial aspect of the statute, particularly with regard to the amendment inserted to assure Congress that each separate registrar would have his or her "day in court" and would not be a victim of guilt through association or be roped into a suit where his office would be governed on the basis of what some other separate official did or omitted doing.

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"A general statement that an officer stands ready to perform his duty falls far short of such a threat as would warrant the intervention of equity. And this is especially true where there is a complete absence of any showing of a definite and expressed intent to enforce particular clauses of a broad, comprehensive and multi-provisioned statute."

13 Brief for the United States, p. 64

A principal foundation for the government's assertion that these members were proper defendants is based upon an erroneous interpretation of the applicable law. Section 3204 of the Mississippi Code of 1942 makes it mandatory that the Board of Election Commissioners appoint the Clerk of the Circuit Court to be the registrar of each county in the State, unless he is affirmatively shown to be an improper person. Section 3206 of that Code makes it transparent that *once a registrar is appointed, there is no authority whatsoever in the State Board of Election Commissioners to remove him from office, whether he is an "improper person" or not.*[14]

The government's brief is likewise in error when it represents that the registration application form was a principal issue in this case. This representation must have been an afterthought, for the registration form was not attached to the complaint and it was not in the record before the court below. It only appears here as an appendix to the Brief for the United States.

If the complaint had shown an entitlement to any relief against any one or more of the registrar defendants, it would have had no meaningful effect for the court to also add on an injunction against the members of the State Board of Election Commissioners. In the absence of any charge of wrongdoing by these defendants, no court of equity would have been warranted in enjoining them because they might create, in the words of the government's brief, "a possible conflict" with the court order by making some undefined sort of directives contrary to it. If, after an order had been entered in a proper suit, it were to be shown that some or all of the mem-

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14. Since the government did not include § 3204 or § 3206 in the appendix to their brief, they are appended hereto.

bers of the State Board of Election Commissioners had in any way contrived or attempted to interfere with the orders of the court, then and only then would it be legal or appropriate to add them as defendants against whom relief would be granted, or to bring some proper action against them to obviate the interference. The equitable maximum permitting full relief does not permit the naming of just any persons as defendants, nor does it encompass the granting of relief without a prerequisite showing that a party has committed or threatens to commit a wrongful act that will result in irreparable injury.

Injunctions should not be granted merely because no demonstrable harm will result to the defendants by their issuance or to establish that past wrongs may have occurred. *Donnelly Garment Co.* v. *Dubinsky,* D.C., 55 F. Supp. 587, 603; *General Electric Co.* v. *Gojack,* 68 F. Supp. 686.

Rule 19, Federal Rules of Civil Procedure makes parties having "a joint interest" indispensable parties. The oft cited case of *Shields* v. *Barrow,* 58 U.S. (17 How.) 130, 136, gave the classic definition of an indispensable party in these words:

> "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

Certainly these Board Members were not indispensable parties under the test required by *Williams et al.* v. *Fanning,* 332 U.S. 490. The decree prayed for did not require these defendants to do a single thing. The entire relief sought related only to the persons who enforce and execute the registration laws.

A recognized general text defines the rule as to proper parties in an equity action in this way:

> "All persons whose interest will *necessarily* be affected by the decree or without whose presence a complete settlement of the questions involved in the action could not be attained are properly joined as defendants.[15]

Mr. Justice Johnson epitomized the answer in *Kerr et al.* v. *Watts*, 19 U.S. (6 Wheat.) 550, 559, in these words:

> "No one need be made a party complainant in whom there exists no interest, and no one party defendant from whom nothing is demanded."

This, exactly, is the position of the members of the State Board of Election Commissioners. It was the registrar, who is the only official with statutory authority to *enforce* and to *register*, to whom this action was addressed by allegation and by prayer.

No authority has been cited by the Department of Justice which overcomes the authority and logic of the decision in *Federal Trade Commission* v. *Claire Furnace Company*, 274 U.S. 160, 173, 174, in which the court approved the dismissal of the Federal Trade Commission as a party-defendant to an injunction suit with the following reasoning:

> "There was nothing which the commission could have done to secure enforcement of the challenged orders except to request the Attorney General to institute proceedings for a mandamus or supply him with the necessary facts for an action to enforce the incurred forfeitures. If, exercising his discretion, he had instituted either proceeding the defendant therein would have been fully heard and could have ade-

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15. 43 C.J.S., 822, Injunctions, § 175.

quately and effectively presented every ground of objection sought to be presented now. Consequently, the trial court should have refused to entertain the bill in equity for an injunction."

In *Fitts* v. *McGhee*, 172 U.S. 516, this court used this apposite language:

> "It is to be observed that neither the attorney general of Alabama nor the solicitor of the Eleventh judicial circuit of the state appear to have been charged by law with any special duty in connection with the act of February 9, 1895. . . . In the present case, as we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional. *They were not expressly directed to see to its enforcement.* If, because they were law officers of the state, a case could be made for the purpose of testing the constitutionality of the statute, by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the attorney general, based upon the theory that the former, as the executive of the state, was, in a general sense, charged with the execution of all its laws, and the latter, as attorney general, might represent the state in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the states of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons."

In *Kresge Co.* v. *Ottinger*, (S.D., N.Y.) 29 F.2d 762, a three-judge district court in an opinion by Circuit Judge A. N. Hand, approved the dismissal of a New York District Attorney and the Board of Optometry in a statutory injunction suit because they were not charged with the en-

forcement of the act involved. Another three-judge district court in *Massachusetts Farmers Defense Committee* v. *U. S. et al.*, (D., Mass.) 26 F. Supp. 941, summed up the law and the authorities thus:

> "It is well settled that where a statute or regulation is challenged as being unlawful or unconstitutional, an injunction will lie *only* against the person or agency who is charged with the enforcement of the statute or regulation. Federal Trade Commission v. Claire Furnace Co., 274 U.S. 160, 47 S. Ct. 553, 71 L. Ed. 978; Grand Trunk Railroad Company v. Curry, C.C., 162 Fed. 978. Gnerich v. Rutter, 265 U.S. 388, 44 S. Ct. 532, 68 L. Ed. 1068; National Conference on Legalizing Lotteries, Inc., v. Goldman, 2 Cir., 85 F.2d 66; Raichle v. Federal Reserve Bank of New York, 2 Cir., 34 F.2d 910; Alcohol Warehouse Corporation v. Canfield, 2 Cir., 11 F.2d 214. See, also, Webster v. Fall, 266 U.S. 507, 45 S. Ct. 148, 69 L. Ed. 411."

In the Kentucky case of *Stiglitz, County Clerk,* v. *Schardien (Reager* v. *Stiglitz, County Clerk; Blair* v. *Lewis, Secretary of State, et al.)*, 239 Ky. 799, 40 S.W.2d 315, 321, the state court of appeals in a legislative reapportionment suit attacking constitutionality of a statute and praying for injunctive relief, said:

> "We are constrained to the conclusion that the circuit court was correct in the disposition made of the case of Blair v. Lewis and others. Conceding that the plaintiff had a right to maintain the suit, it was nevertheless necessary for him to sue some one *who had some duty to perform respecting the enforcement and practical operation* of chapters 147 and 148 of the Acts of 1930. Neither the Secretary of State nor the state board of election commissioners had any such duty to perform. Axton v. Goodman, 205 Ky. 382, 265 S.W. 806. The Attorney General had published the Acts of 1930 months before the suit was filed and his

duty had been discharged. Revis v. Daugherty, Attorney General, 215 Ky. 823, 287 S.W. 28. The duties of the Secretary of State would be the same under the acts of 19[illegible] and the acts of 1930, and there was no basis for an injunction against that officer. Blair failed to manifest to the court how any relief could be granted against any of the defendants to his suit; hence its dismissal on demurrer was proper."

If these Board members can be made nominal or "non-defendant" defendants because they supervised the making of a form could the printing company that printed it be similarly included?—The suppliers of the ink?

**Cases Distinguished**

On page 66 of the brief for the United States, the appellant cites four cases in support of its position that the election commissioners were properly joined as defendants. A short analysis of these cases shows them to be inapposite to the situation of the State Election Commissioners.

In *Bevins* v. *Prindable*, 39 F. Supp. 708, a three-judge district court ruled that the Governor and Attorney General were proper parties to such a proceeding in view of the requirement of the statute (now 28 *U.S.C.A.* 2284 (2)) providing that notice of the suit must be delivered to them.[16]

16. The Court relied upon *Arneson* v. *Denny*, (S.D. Wash.) 25 F.2d 993. There District Judge Cushman, writing for a three-judge district court, did use the words "Neither the Governor nor Attorney General is named in the complaint as a party defendant, yet the statute, at least in so far as the application for an interlocutory injunction is concerned, makes both the Governor and the Attorney General indispensable parties, and there must be reasonable notice to both before a determination pursuant to the statute be had on such application," but a study of his opinion indicates he ruled only that it was indispensable that they receive the same *notice* a party would receive. On the same day the same court rendered a decision on the merits in the case. (See 25 F.2d 988.) Other

The court went on to state:

> "Since these defendants are not charged with having actually done or threatened to do anything of which plaintiffs complain, the term 'defendants' when used hereafter will refer to the other defendants only."

This ruling was purely dicta, inasmuch as the court went on to refuse to issue the interlocutory injunction prayed for. Actually the Governor and the Attorney General were not in any position to have appealed from the court's ruling retaining them as "defendants" if they had wanted to, because the court, in the same holding, denied the plaintiff any relief against them. On appeal to this court, a motion to affirm was made and ruled on in the following language (314 U.S. 537):

> "The motion to affirm is granted and the judgment is affirmed." Citing *Beal v. Missouri*, 312 U.S. 45, 49-51; and *Watson v. Buck*, 313 U.S. 387, 400, 401.

The point as to the joinder of these parties who the court could not even bring itself to call defendants, passed *sub silentio* in this court's ruling. The real thrust of the case and the principle which this court affirmed, has a very pertinent bearing on the merits of the present appeal as to other appellees. It is discussed in the brief of the various registrar defendants.

The next case cited was *Orleans Parish School Board v. Bush*, 286 F.2d 78. In this case the 5th Circuit refused to dismiss the Orleans Parish School Board as a defendant. The court ruled that the contention of the School Board that an act of the Legislature had relieved them of their duties was an erroneous contention. They specifically

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special courts have dismissed similar actions against these same officials. *Comacho v. Rogers*, (S.D., N.Y.) 199 F. Supp. 155.

found that under such act "the operation of the Orleans Parish schools is still *confided* to the appellant board, . . .". On petition for rehearing the court stated that no conceivable construction of the State statute could affect their determination that this defendant was "*the* agency engaged in the operation . . ." against which the injunction order ran. Certainly the School Board, so situated, was a proper defendant, indeed, it was an indispensable defendant. This case contains an excellent discussion of the proper approach to the application of the doctrine of abstention and will also be further discussed in the brief of the Registrars.

The next case was *James et al.* v. *Almond et al.*, 170 F Supp. 331. There the district court without citation of authority, retained the Attorney General of the State as a defendant in an injunction action because he had a general duty to enforce the law.[17] Although the citation by the appellant shows "appeal dismissed 359 U.S. 1006", their brief does not advise the court that such dismissal was pursuant to *stipulation of the parties* and, therefore, does not reflect any ruling by this court on this point.

The last case cited is *Evans et al.* v. *Members of the State Board of Education*, 149 F.Supp. 376. In that case a statewide Board of Education had specific authority to operate schools. It delegated a portion of its authority to a local Board of Education by requiring it to submit a plan for desegregation. The court held that both parties so situated were proper defendants. This holding, however, sheds no light on the government's claim of a right to maintain this suit against the State Board of Election Commissioners, who are parties against whom no charge of any

17. Cf. *Watson* v. *Buck*, 313 U.S. 378, 400.

action whatsoever is made and against whom no relief could be granted. Incidentally the Court of Appeals in its opinion, 256 F.2d 688, 694, adhered to the well established rule against presuming wrongdoing on the part of public officials in these words:

> "We reiterate that we will not assume that the members of the local school boards, also named as defendants in the instant litigations, will not adhere to rules and regulations of the State Board of Education as to the non-discriminatory racial practices if such rules and regulations are created and promulgated by the State Board of Education."

## CONCLUSION

Not one single valid countervailing argument has been advanced why the reasoning of the court below as to these defendants was not completely sound and their dismissal should not be affirmed. The court stated:

> "We have examined the Complaint in detail without finding any fact allegation that these Commissioner Defendants did in any way enforce any of the statutes under attack, nor is any fact allegation made that their actions enforced a denial of registration to any otherwise qualified applicant because of the race or color of the applicant or for any other reason.
>
> No choice is given to the State Election Commission in the selection of County Registrars, that duty arising only in the extreme situation where they have reached the determination that the duly elected Circuit Clerk is an "improper" person. They have no control over the tenure or actions of the Circuit Clerk as Registrar once they have appointed him as required. They are rigidly regulated as to the type of registration forms they must prepare. The statutes make it plain that they are mere conduits through whom a minor part of the

registration process is required by statute to flow. The State Election Commissioners are not charged in the Complaint with promulgating any form or with appointing any Registrar otherwise than in accordance with their duties under the statutes relied upon by plaintiff. These statutes are not under attack in this case. Considering the Complaint and any set of circumstances which could be proved under its allegations, we cannot visualize how an injunction could issue against the State Board of Election Commissioners or any of its members individually, for they are not charged with enforcing or threatening to enforce any of the statutes under attack. The presence of the State Election Commissioners as parties-defendant in this litigation nevertheless presents the rights of three additional defendants which must be recognized by way of pleadings, discovery procedures, objections to evidence, cross-examination of witnesses, presentation of evidence, and the many other trial procedures which, while time-consuming, are the due of every litigant under our system of judicial procedure.

Three-judge courts constitute a unique burden on the Federal Judiciary. To keep this burden to a minimum, the statutes vesting the right to call such courts to sit in judgment of constitutional challenges are to be strictly construed as a procedural technicality and not as a broad remedial social policy. See *Phillips* v. *United States*, 312 U.S. 246; *Stainback* v. *Mo Hock Ke Lok Po*, 336 U.S. 368; and *Kesler* v. *Dept. of Public Safety*, 369 U.S. 153.

Where, as here, parties are brought before such a tribunal who are not at all within the contemplation of the statutes attacked and who are not indispensable, necessary or proper parties to the determination of the issues in controversy, they should be dismissed in the interests of sound judicial administration as well as to

spare the litigants themselves the expense and inconvenience of a trial procedure. (R. 1533, 1534).

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# APPENDIX

## Mississippi Code of 1942

**§ 3204. Board of election commissioners and registrar.**

There shall be a state board of election commissioners, to consist of the governor, the secretary of state, and the attorney-general, any two of whom may perform the duties required of the board; a board of election commissioners in each county, to consist of three discreet persons who are freeholders and electors in the county in which they are to act, and who shall not all be of the same political party, if such men of different political parties can be conveniently had in the county; and a registrar in each county who shall be the clerk of the circuit court, unless he shall be shown to be an improper person, to register the names of the electors therein.

**§ 3206. Appointment of registrars.**

The state board of election commissioners, on or before the fifteenth day of February succeeding each general election, shall appoint in the several counties registrars of elections, who shall hold office for four years and until their successors shall be duly qualified. And the registrar is empowered to appoint a deputy registrar, with the consent of the board of election commissioners, who may discharge the duties of the registrar.